Supreme Court, U.S.
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No. 10-772

In The
Supreme Court of the United States

THE CITY OF HAZLETON, PENNSYLVANIA,

Petitioner,

v.

PEDRO LOZANO, HUMBERTO HERNANDEZ, ROSA LECHUGA, JOHN DOE 1, JOHN DOE 2, JOHN DOE 3, A MINOR, BY HIS PARENTS, JANE DOE 1, JANE DOE 2, JANE DOE 3, JOHN DOE 4, A MINOR, BY HIS PARENTS, BRENDA LEE MIELES, CASA DOMINICANA OF HAZLETON, INC., HAZLETON HISPANIC BUSINESS ASSOCIATION, PENNSYLVANIA STATEWIDE LATINO COALITION, JANE DOE 5, JOHN DOE 7, JOSE LUIS LECHUGA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I. Respondents Mischaracterize One Conflict Preemption Holding as Four Separate Holdings.

The most compelling reason for this Court to grant the writ – or at a minimum, grant, vacate, and remand (GVR) this case to the Third Circuit – is that this Court is currently considering *the same preemption challenges to a similar statute* in the pending case of *Chamber of Commerce v. Whiting*, No. 09-115. *Whiting* involves preemption challenges to an Arizona law which, like the IIRAO, mandates the use of the federal E-Verify system for certain employers and establishes a state-level process for suspending the business licenses of employers who knowingly hire unauthorized aliens.

Respondents, in their Brief in Opposition (hereinafter "Resp."), acknowledge that "there is significant overlap in the preemption issues raised by Hazleton's employment provisions and those raised by the Arizona law at issue in *Whiting*." Resp. 11. However, Respondents claim there are additional, independent preemption holdings in the opinion of the Third Circuit that would be unaffected by the decision of this Court in *Whiting*. Resp. 12. Therefore, they insist that even a decision sustaining the Arizona law in *Whiting* would not help Petitioners. *Id.*

Respondents' argument is flawed on multiple levels – not the least of which is that it requires this

Court to assume that Respondents will prevail on the merits. An additional problem is that Respondents mischaracterize the holding of the court below. Respondents do so by arguing that each of the four reasons that the court gave to support its conflict preemption holding is a separate and independent holding. Resp. 12, 20. This is a significant misreading of the decision below.

The Third Circuit relied on a *single* conflict preemption argument in invalidating the employment provisions of the IIRAO: "The IIRAO substantially undermines [the] careful balance" allegedly struck by Congress in enacting IRCA. App. 88. The court reiterated, "Hazleton's IIRAO undermines IRCA's careful balancing of objectives in at least four ways." App. 92. The court then described four ways the IIRAO undermines the purported balance: (1) it increases employers' burdens by creating a separate adjudicative scheme, App. 92-95; (2) it induces employers to use the federal E-Verify electronic work verification system, App. 96-103; (3) it refers to independent contractors, App. 103-04, and (4) it contains inadequate anti-discrimination provisions, App. 104-07.

Respondents mischaracterize the Third Circuit's holding by declaring that each of these four reasons is a free-standing basis for a conflict preemption holding. *See* Resp. 12, 17. Therefore, Respondents suppose, if the forthcoming *Whiting* decision does not address each of these four issues, then the IIRAO would still be preempted. The problem with Respondents' argument is that the Third Circuit never

specified how many of the IIRAO's four "fail[ures] to afford proper weight" would suffice to tip the IRCA balance. App. 101. Was one enough, as Respondents assert? The Third Circuit did not say. *See* App. 88-107.

Assuming *arguendo* that Respondents' reading of the opinion below were correct, Respondents' arguments still would fail, as explained in Part II.

II. Respondents' Additional Conflict Preemption Arguments Against the IIRAO Employment Provisions are Unavailing.

Respondents assert that the IIRAO's employment provisions are conflict preempted in multiple independent ways. Respondents also contend that two alleged conflicts between the IIRAO and the federal scheme do not exist between the Arizona law and the federal scheme.[1] In each case, the asserted conflict is either nonexistent or irrelevant.

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[1] Respondents make this point regarding the presence of a good-faith compliance defense, Resp. 12, and the attributes of the IIRAO hearing process. Resp. 15.

A. The Existence of a Defense of Good-Faith Compliance With the I-9 Process is an Irrelevant Distinction Between the IIRAO and the Arizona Law.

Respondents first argue that the IIRAO does not include a defense of good-faith compliance with the I-9 process, while the Arizona law does. Resp. 12-14. However, Respondents are forced to concede that while the face of the Arizona statute includes such a defense, in practice 8 U.S.C. § 1324a(b)(5), which limits the use of I-9 information, will make such a defense meaningless. Resp. 12, n.7. Thus, it is a distinction without a difference.

Respondents also fail to consider how the IIRAO operates. The IIRAO does not immediately penalize any employer who is found to have hired an unauthorized alien. Rather, the IIRAO first offers such an employer an opportunity to correct his error. Once a complaint is filed and it is subsequently determined that an employer has hired an unauthorized alien, the employer is given three business days to correct the violation. If the employer does so, no penalty occurs. IIRAO § 4.B(4), App. 354. In addition, this three-day period may be tolled if the employer invokes IIRAO §§ 7.C(2) or 7.C(3). App. 364-65. Thus, the employer can bring the administrative proceeding to a halt by terminating the unauthorized alien's employment. Because Respondents brought a facial challenge before the IIRAO was in effect, it is uncertain whether any employer would ever go past this point in the process. Thus, in the context of this facial

challenge, it is unclear how a good-faith compliance provision could even be relevant.

B. Respondents Misrepresent the IIRAO's Administrative Hearing Procedure and Due Process Protections.

Respondents next argue that the IIRAO differs from the Arizona law because it "impos[es] penalties on employers without a hearing or a finding by a neutral decisionmaker." Resp. 15. This argument significantly misrepresents the IIRAO, which provides an administrative hearing where the employer may present information relating to the identity of the employee for determination of the employee's work authorization. IIRAO § 4.B(3), App. 355. In the district court, the head of the Hazleton Code Enforcement Office described the planned implementation of Section 4.B(3). He explained that this section described an administrative hearing process including notice and an opportunity for the employer to present any relevant information. *See* App. 284, n.59.

Because the IIRAO has never been in effect, any judicial assessment of this asserted distinction is premature. The officials involved must be given the opportunity to construe the law in a constitutional manner. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008).

Respondents also mischaracterize the additional due process and judicial review protections provided in IIRAO Section 7, asserting that "penalties can be

imposed without any court proceedings or other hearings." Resp. 16. However, Section 7.F provides that any business entity or employee subject to a complaint and enforcement may bring an action to challenge enforcement of the IIRAO at any time, including prior to the imposition of any penalty. The action may be brought in the Magisterial District Court of Hazleton, subject to appeal through the Pennsylvania state court system, or in any other court of competent jurisdiction. IIRAO § 7.F, App. 367.

Finally, it must be remembered that Respondents' preemption challenge on this point is that any system of adjudication that is not literally identical to the "federal scheme" is conflict preempted. Resp. 16. However, Respondents fail to mention that Arizona's law too operates through a state court adjudicative process that differs from the federal scheme. Ariz. Rev. Stat. § 23-212. The principal question before this Court in determining whether to grant the writ (at least for GVR purposes) is whether the forthcoming decision in *Whiting* will be applicable to the instant case. Minute distinctions between the adjudicative process of the Arizona law and the IIRAO will likely be irrelevant.

C. The IIRAO's Treatment of Casual Domestic Labor and Independent Contractors Does Not Present a Conflict with Federal Law.

Respondents also argue that the IIRAO's treatment of independent contractors and casual domestic labor presents a separate source of conflict preemption. Resp. 16-17. However, Respondents' argument misreads the IIRAO to find a conflict with federal law where none actually exists.

Under federal law, a person or entity may not hire an individual without complying with certain employment eligibility verification requirements. 8 U.S.C. § 1324a(a)(1)(B)(i). There is a narrow, non-statutory exception for casual domestic workers under 8 C.F.R. § 274a.1(h). Respondents fail to mention that this regulatory exception only extends to "casual employment *by individuals*" where the workers "provide domestic service *in a private home* that is sporadic, irregular or intermittent." *Id.* (emphasis added). This "domestic" employment exemption is narrow – including only household tasks that would normally be completed by a resident of the household. *Jenkins v. Immigration and Naturalization Services*, 108 F.3d 195, 197 (9th Cir. 1997). In addition, "domestic" work only refers to household tasks completed *within* one's private abode. *Id.*

In contrast, the IIRAO extends only to employment relationships involving a "business entity." IIRAO § 4.A, App. 354. The term "business entity"

does not extend to a homeowner employing a casual domestic worker. IIRAO § 3.A(2), App. 352. Because the federal casual domestic worker exception is defined so narrowly, there is no overlap with the IIRAO and no conflict with federal law.

Respondents' argument regarding independent contractors is also incorrect. Employers have no duty under federal law to determine the employment eligibility of independent contractors. However, if an employer is made aware that an independent contractor or his worker is an unauthorized alien, then federal law effectively transforms that business-independent contractor relationship into an employer-employee relationship. The business entity that engages in such prohibited contractual activity "shall be considered to have hired the alien for employment in the United States in violation of paragraph 1(A)." 8 U.S.C. § 1324a(a)(4). Moreover, it is an additional violation of federal law for a business entity to continue to "employ" an independent contractor once the business entity has learned that the person "is (or has become) an unauthorized alien. . . ." 8 U.S.C. § 1324a(a)(2).

The IIRAO is consistent with this federal scheme. Once the federal government verifies that an alien worker is unauthorized, the business entity receives official notification of that fact from the City under IIRAO § 4.B(3); App. 355. At that point, federal law treats the relationship as an employer-employee relationship. Accordingly, by requiring the business entity to terminate the employment of the

unauthorized alien or otherwise correct the violation, the IIRAO is consistent with federal law.

In summary, Respondents' attempt to identify additional bases of conflict preemption (while asking this Court to assume that they are correct on the merits) is unavailing. Respondents have failed to explain why the writ should not issue for GVR purposes in light of this Court's forthcoming decision regarding nearly-identical preemption claims in *Whiting*.

III. The Circuits Have Uniformly Held that Licensing Sanctions are Not Expressly Preempted by 8 U.S.C. § 1324a(h)(2).

Respondents next suggest that this Court should deny the writ because the IIRAO's licensing sanctions are "expressly preempted" and note that Petitioners did not "mention express preemption" in their Petition. Resp. 19-20. Petitioners did not "mention" express preemption because the Third Circuit, like every other Circuit to address the issue, held that the provisions were *not* expressly preempted. App. 81-82; *Chicanos Por La Causa v. Napolitano*, 558 F.3d 856, 866 (9th Cir. 2009) *cert. granted*, *Whiting*, No. 09-115; *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 766 (10th Cir. 2009). Because the Third Circuit rejected Petitioners' express preemption claim, it does not "provide[ ] a separate and independent ground for affirming the judgment below." Resp. 20.

IV. Lower Courts Need Guidance Now on Whether Rental Housing Ordinances are Preempted.

Respondents assert that review of the IIRAO rental provisions is unnecessary, claiming that lower courts "unanimously" share their position. Resp. 20-22. Respondents misrepresent the holding of at least one of these courts.[2] Respondents also fail to mention that another federal court is specifically awaiting guidance from the instant case before proceeding. In 2007, the Northern District of Georgia issued a consent order staying all proceedings in a challenge to a county ordinance prohibiting the rental of apartments to illegal aliens until further guidance was provided by a final decision in this case. *Stewart, et al. v. Cherokee County*, No. 07-CV-0015 (Order of Jan. 4, 2007).[3]

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[2] Respondents' characterization of *Reynolds v. Valley Park* is misleading. *See* Resp. at 21. The state court in *Reynolds* held that the city's rental ordinance violated Missouri *state* law, not federal law. *Reynolds v. Valley Park*, No. 06-CC-3802 (Mo.Cir.Ct. St. Louis Co., Mar. 13, 2007). The Eastern District of Missouri actually *rejected* a federal preemption challenge to the city's employment ordinance. *Gray v. Valley Park*, 2008 U.S. Dist. LEXIS 7238 (E.D. Mo. Jan. 31, 2008) *aff'd on other grounds* 567 F.3d 976 (8th Cir. 2009).

[3] The court also stated that it was waiting for guidance from the *Valley Park* case. However, Valley Park repealed its rental ordinance; the federal courts reviewed preemption challenges to the employment ordinance only. *See Gray*, 2008 U.S. Dist. LEXIS 7238 at *2. Thus, only the *Hazleton* case now has a bearing on the stayed proceeding.

As Respondents acknowledge, at least two federal district courts have issued opinions regarding similar ordinances. Resp. 21. Respondents also correctly state that additional municipalities have similar ordinances pending before lower courts. Resp. 22. In addition, still more municipalities have sought to enact similar ordinances, but have declined to do so because of legal uncertainty and the attendant threat of litigation.[4] This Petition presents the Court with a timely opportunity to provide necessary guidance to lower courts on this pressing issue of national importance.

V. Review is Warranted to Resolve the Circuit Split Regarding the Definition of "Harboring."

Respondents claim that no Circuit split exists concerning the definition of "harboring" in 8 U.S.C. § 1324(a)(1)(A)(iii). Resp. 23-26. However, the Third Circuit itself disagreed. App. 118-19. Respondents cannot obscure the plain reality that the Circuits are currently applying three distinct definitions of that term. Pet. at 34-38.

Respondents also claim that the three cases identified by Petitioner, in which Circuit Courts

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[4] *See*, e.g., Stephen McLamb, *ACLU Looking Into Albertville's Plans for Stopping Illegal Immigration*, WAFF (July 15, 2010), available at http://www.waff.com/Global/story.asp?S=12815239#.

found harboring where defendants knowingly rented accommodations to illegal aliens, differ materially from the instant case. They claim that the three cases concern "much more" than knowingly renting to illegal aliens. Resp. 25. However, Respondents mischaracterize these cases.

Respondents' misrepresentation of *United States v. Franco-Beltran*, 229 Fed. Appx. 592 (9th Cir. 2007), is particularly brazen. Respondents claim that the defendant in that case "admitted . . . to 'bringing people' *into the United States*." Resp. 25 (emphasis added). Respondents added the words "into the United States." The defendant's co-conspirator had directed the assistant apartment manager to raise the rent of "several apartments used for harboring aliens" because the defendant was "bringing people." *Franco-Beltran*, 229 Fed. Appx. at 594. However, the defendants' nephew actually transported the aliens and was separately prosecuted for alien smuggling. *Id.* Nothing in the opinion suggested that the defendant was also smuggling illegal aliens into the country. It was enough that she provided apartments to persons whom she knew to be illegal aliens. *See id.* Moreover, the defendant did nothing to conceal the illegal aliens – the element at the center of the Circuit split.

With respect to *United States v. Acosta de Evans*, 531 F.2d 428 (9th Cir. 1976), Respondents point to the fact that the defendant had a conversation with the illegal alien in Mexico, prior to the harboring, during which the illegal alien stated that she could not

obtain "immigration papers." Resp. 25. Respondents therefore declare that the defendant somehow did "much more" than knowingly provide an apartment to an illegal alien. Resp. 24-25. On the contrary, all that the conversation revealed was that the defendant "knew that Imelda was illegally in the country." *Acosta de Evans*, 531 F.2d at 429. More importantly, the defendant did nothing to hide the illegal alien from detection during the two months that she harbored her. As the Ninth Circuit stated: "De Evans' central contention is that the word 'harbor' . . . means to harbor so as to prevent detection by law enforcement agents . . . We disagree." *Id.* The court concluded by defining "'harbor' to mean 'afford shelter to' . . . " *Id.* at 430. Respondents' suggestion that some other element of harboring was required in *Acosta de Evans* is false.

Respondents also claim that *United States v. Balderas*, 91 Fed. Appx. 354 (5th Cir. 2004), involved much more than knowingly renting to illegal aliens because the opinion noted that a "red light [on the house] could function as a signal to aliens." *See* Resp. 25. Respondents add their own spin to this fact and declare that case involved an "ongoing operation intended to conceal the presence of unauthorized aliens." Resp. 25-26. Respondents miss the point of the case. The question was whether the bare fact that the defendant knew that illegal aliens were being afforded accommodations in a section of his home could sustain a harboring conviction. The defendant contended "the evidence was insufficient to support

his conviction because it proved, at most, that he provided illegal aliens with temporary shelter." 91 Fed. Appx. at 354. The Fifth Circuit rejected this contention, noting that the defendant's wife "informed [him] that there were illegal aliens staying there; and he told her he did not care." *Id.* at 355. In other words, this evidence was sufficient to support his conviction for harboring. Contrary to Respondents' suggestion, the Fifth Circuit rejected the view that more was necessary for harboring to occur. *See also United States v. Martinez-Medina*, 2009 U.S. App. 890, *3 (5th Cir. 2009).

For all of these reasons, Respondents have failed to show why the writ should not issue.

Respectfully submitted,

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